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No. 10997

In the  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

B. H. PRENTICE,

*Appellant,*

vs.

L. BOTELER, Trustee in Bankruptcy  
of the Estate of Dr. W. J. Ross  
Company, a Corporation, Bankrupt,  
*Appellee.*

Appellant's Opening Brief

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over the parties by reason of the principal place of business of the Bankrupt having been for the eight years preceding the filing of the Original Petition under Chapter XI, in the County of Orange, State of California. (Original Petition, Par. I R. 2) (U. S. C. Title 28, Sec. 41, Subd. 19.)

This Court has jurisdiction by reason of Title 28, Section 225, Subdivision (a) of Federal Code Annotated (Judicial Code, Sec. 128) the orders appealed from being final orders. (See discussion and Citations p. 7 of this brief.)

### STATEMENT OF THE CASE

Under Date of May 23, 1942 (R 7), Dr. W. J. Ross Company, a Corporation, filed their petition in Bankruptcy with the District Court of the United States, Southern District of California, Central Division under the provisions of Chapter XI, and prayed for relief under the provisions of Section 322, of the Bankruptcy Act (R 2). Whereupon the District Court approved the petition and referred the matter to Ben E. Tarver, Esquire, one of the Referees in Bankruptcy of the District Court. (R 7).

On June 17, 1942, the Bankrupt filed its withdrawal of plan of arrangement and consented to adjudication and admitted in writing its inability to pay its debt (R 9). Whereupon there being no objection it was adjudged the said Dr. W. J. Ross Company, a Corporation, was a Bankrupt. (R 9). Bond of Trustee was examined, recommended for approval and filed July 8, 1942. (R 10-11).

Among the assets of the Bankrupt was a parcel of real property situated in the City of South Gate, California and comprising some 3.75 Acres more or less of land (R 8) being a part of Lot "A" of Tract No. 486 as per map recorded in Book 15, pages 30 and 31 of

Maps in the office of the County Recorder (R 20). Under date of July 20, 1942 (R 21) the Referee authorized the Trustee to sell at private sale or at public auction to the highest and best bidders therefor the real property as above described (R 20) subject to confirmation of the Court (R 21). Under date of April 15, 1943 (R 24) the Trustee filed his Return of Sale of Real Property, (R 21), which set forth that he had sold the real property in question to the Baruch Corporation (R 21), that the purchaser had deposited its check in the sum of \$225.00 with the Trustee as evidence of good faith, the balance of purchase price to be paid in full after confirmation of sale by this Court and upon completion of escrow with the Title Insurance and Trust Company (R 23).

Subsequently the Trustee ordered inserted in the Los Angeles Daily Journal (R 69) an advertisement which called attention to the subject Real Property Sale, setting forth that the sale would be held on Wednesday, March 10, 1943, at 10:00 o'clock A. M. in the Court room of Ben E. Tarver, Referee at Santa Ana, California (R 42) said advertisement was published in the said Los Angeles Daily Journal on March 5th and 10th, 1943 (R 42).

On March 10, 1943, at 10:00 o'clock A. M. this appellant was present (R 13) in the Court Room of the Referee. As to what transpired at that time there is some discrepancy in the record, as between the Referee's Record of Proceedings (R 24), the Referee's Certificate on Review (R 12), the Statement of Facts



in Lieu of Reporter's Transcript (R 39), and the Statement of the proceedings as set forth in the Affidavit of T. H. Clements (R 54). There was no full Stenographer's report taken at the meeting (R 16) but copious notes of what transpired were made immediately after the sale by two of those present, which notes were later referred to in preparing the affidavit of Mr. Clements (R 58). Suffice it to say at this time that the Referee stated he had up for confirmation or sale the parcel of land in question, (R 14), that he had before him for his attention the Trustee's Return of Sale of a parcel of land for \$2250.00, and his Petition for its confirmation (R 13). That a Mr. Clements who was present bid \$2300.00 and this appellant bid \$2325.00 for the real property in question (R 14). That this appellant tendered a check for \$233.00, as a deposit (R 14). That this appellant's bid of \$2325.00 was the highest sum there bid (R 15). That the bid of the Baruch Company was accompanied by the deposit of a check with the Trustee in the sum of \$225.00 (R 23). That at some stage of the proceedings the Referee stated that he would not consider any bid unless it was at least 10% higher than the \$2250.00 bid (R 14-49-56). This was an erroneous ruling.

Mr. Baruch representing the Baruch Corporation was present (R 13) and stated in substance that they had been to quite a lot of expense in looking up this deal and he did not think any other bids should be entertained (R 49-57). That he had spent \$75.00 in surveying the property in question on the faith of having the purchase confirmed and also spent other



amounts making a total of about \$125.00 (R 18-69). This statement should never have been included in the record. Some question was raised as to appellant's check (R 14-45-57). and this appellant offered to post a cash deposit in lieu of the \$233.00 check tendered (R 45-46-57). That the Referee returned the check for \$233.00 to this appellant (R 14-46-57) and stated that he would not accept even a certified check from the Appellant unless it was in an amount 10% greater than the bid of \$2250.00 (R 14-15). Which ruling constituted an arbitrary abuse of discretion.

That the Referee announced the property was sold to the Baruch Company (R 46) and the appellant protested the sale (R 46-47).

That on March 16, 1943 the Order confirming sale of the property in question to the Baruch Company, for \$2250.00, was entered (R 17-30). That said order recited among other things that one Prentice (this Appellant) had offered a \$50.00 raise above the bid had by the Trustee (R 27) but that the said \$50.00 raise was refused by the Referee upon recommendation of the Trustee (R 28). The amount of the raise or advance bid by this appellant was actually \$75.00 (R 69). (Bid by this appellant \$2325.00 (R 14-15-44-56-69), by Baruch Company \$2250.00 (R 13-14-44-55-69).) On April 24, 1943 the Honorable Paul J. McCormick, United States District Judge, made an order extending this appellant's time wherein to file Petition to Review Referee's Order to March 31, 1943 (R 70), and the said petition to review Referee's order was filed March 29, 1943 (R 26).

That a Notice of Motion to amend the Referee's Certificate on Review (R 51), together with Affidavit of Mailing (R 53-54) was filed by this Appellant on April 30, 1943 (R 59) together with the supporting affidavits of this Appellant (R 58), and T. H. Clements (R 54).

On May 3, 1943 the Petition to review Referee's Order and Motion to Amend Referee's Certificate on Review, came on for hearing before the Honorable Paul J. McCormick (R 68). Subsequently an order dismissing Petition for Review and Confirming Order of Referee (R 60) was prepared by counsel for Appellee, lodged and submitted to this Appellant who disapproved the same and filed his objections to the said order (R 64-65). Whereupon an order confirming Order of Referee (R 67) was filed May 13, 1943 (R 71). That in the order confirming Order of Referee (R 67) the Honorable Court found that "according to the Referee's Certificate, it was stated at the hearing by one, Baruch, representing the successful bidder, that the Baruch Corporation, relying on said private sale and the confirmation thereof, in good faith spent a total of about \$125.00, in surveying the property and in other expense and the Referee found that it would be manifestly unfair in view of said expenditures to refuse to confirm said private sale unless a substantial increase in the bid of at least ten (10%) per cent at the time of the confirmation there" (R 70). Which ruling was erroneous and contrary to settled law.

Appellant filed Notice of Appeal on June 11, 1943 from the Order of the Referee of March 16, 1943, and from the Orders of the District Court of May 7th and 13th, 1943 (R 73-74). Appellant's Cost Bond on Appeal (R 75), was filed June 12, 1943 (R. 76).

## ARGUMENT

The Orders appealed from were Judgments of the Court.

F. R. C. P. 54 (A).

They were final judgments in that they completely determined the rights of the appellant in the Lower Court.

AMSINCK & CO. INC. v. SPRINGFIELD  
GROCER CO., 7 Fed. (2nd) 855-859,

in which it was stated—

“A final judgment leaves no further judicial act to be performed.”

### The Confirmation of the Sale Was Error and Constitutes an Abuse of Discretion

It is the clear duty of the Trustee and Referee to obtain the greatest possible return to the creditors of the bankrupt estate.

CURIN v. NOURSE, 66 Fed. (2nd) 137-140;  
KIMMEL v. CROCKER, 72 Fed. (2nd) 599-  
601.

In the case last above quoted the Court stated:

“It would clearly be an abuse of discretion to accept the lesser of two comparable bids.”

In the first case quoted above the Court stated,

“The confirmation of this sale should only have been made after a fair hearing and upon proof justifying the conclusion that the properties were being sold for all that could reasonably be obtained for them, that the trustee had acted freely and fairly in making the sale, and that it was for the best interest of all concerned that the same should be consummated.”

In the instant case the record clearly shows that the two bids were comparable. Both Baruch and Prentice were present at the sale (R 13). Baruch had tendered a written bid of \$2250.00 (R 16) and posted a check for \$225.00 (R 23), Prentice bid \$2325.00 (R 14) and posted a check for \$233.00 (R 14).

The Referee returned the Prentice check (R 14-46) and stated he would not accept it even though it was certified unless it was in an amount 10% greater than \$2250.00 (the amount of the Baruch bid) (R 14-15). This would have required that Prentice have on his person and ready to produce a certified check in the amount of \$2475.00 in order that his bid receive any consideration from the Referee. That the Referee intended to and did hold a sale of the property is evident from the four statements as set out in the Referee's Certificate on Review (R 12) wherein it is

stated "or enough of it to identify it as the parcel of land that was up for confirmation *OR* sale." (R 14) "merely read the description of the land before him *for sale*" (R 14). "That while the Referee asked for higher bids as stated he did not announce that he would sell the property at auction or that he would auction *the sale*," (R 14), "The Referee in the presence of those present as hereinbefore stated, rang up Mr. L. Boteler, the Trustee, in Los Angeles, and said to him that he, the Referee, was rejecting bids of \$2300.00 and \$2325.00 for the property in question as they were not in an amount 10% greater than the price set forth in the Return of Sale as being the bid by the purchaser named therein—the Baruch Corporation, and that he did not think that any sum less than that should be accepted," (R 15) Mr. Baruch evidently considered the possibility of other bidders purchasing the property at that time inasmuch as he protested the acceptance of more than one bid (his Principal's bid) (R 45).

If there was to be no sale other than to the Baruch Company why did the Referee ask for bids and then decline to accept them? (R 14-16). If it were unfair to the Baruch Company to accept the Prentice bid (R 69) at an advance of \$75.00 over the Baruch bid would an advance bid by Prentice of \$225.00 as demanded by the Referee (R 14-15) have revised the situation to where it would have been fair to the Baruch Company for the Referee to have confirmed the sale to Prentice?

That the property was not being sold for all that could reasonably be obtained for it is self evident. Prentice was present and bid \$75.00 more than Baruch (R 14) and his bid was not considered (R 14-15). The Prentice offer was reasonable in that it was on the same terms as was the Baruch offer (R 14-23).

### **The Referee Should Not Have Considered Unsupported Statements in Making His Decision**

F. R. C. P. Rule 43 (A);

C. C. P. 1867;

C. C. P. 1869.

The unsupported statement by Baruch made at the time of sale to the effect that they had expended about \$125.00 in surveys, etc. (R 18) should not have been considered by the Referee in making his decision.

If the Baruch Company had prior to the date of sale spent \$125.00 in surveying and other expenses in connection with their offer to purchase this property, as was stated at the sale (R 18) the statement should not have been considered by the Referee for two reasons. First, the record does not disclose that the person making the statement was sworn and therefore the testimony had no standing and secondly, if the sum so claimed was actually spent by the Baruch Company, such action did not impose a burden on the Referee to confirm the sale of the property to them. It was a matter of record that before title could pass the sale would necessarily have to be confirmed by the Court. (R 21)



If by the incurring of expense on the part of a prospective purchaser for property to be sold by the Trustee, prior to the Confirmation of Sale hearing, one gains the advantage of being awarded the property over the higher bids of other bidders it would be futile to hold sales. One would but have to make an offer to the Trustee to purchase and then expend a sum of money (in this case it was stated \$125.00 or less than 5% of the bid) to be assured of Confirmation of the Sale.

**It Was an Abuse of Discretion for the Referee To Demand  
An Upset Bid in Any Amount**

For the Referee to demand that Prentice bid \$2475.00 was error and abuse of discretion.

**WILLIAMS—COAL CITY HOUSE FURNISHINGS CO. v. HOGUE, 197 Fed. 1.**

In the case herein cited one Williams & Schmulbach bid \$75,500.00 and one Herd bid \$75,525.00, a raise of \$25.00 on a \$75,500.00 bid. The Trustee refused to accept the bid of Herd and reported to the Referee the sale of the property to Williams & Schmulbach for \$75,500.00 requesting confirmation of sale. At the time set for confirmation of the sale Herd protested the confirmation and filed his petition moving that his bid of \$75,525.00 be accepted. The Referee ruled that Herd must make an upset bid of \$78,000.00 in order to have the property resold. Herd excepted to this order and filed a petition for Review in the Dis-



trict Court which was granted. The District Court reversed the order of the Referee and directed the Referee to sell the property provided Herd file a certified check for one-fourth of the amount of his bid (terms of sale as announced were one-fourth cash down). The assignee of the Williams & Schulbach bid appealed from the judgment of the District Court. In the decision of the United States Circuit Court of Appeals Fourth Circuit it is stated,

“We entertain no doubt that Herd acquired, by his proposal to pay the sum of \$75,525.00 accompanied by his readiness and ability to comply with the terms upon which bids were enacted by the Trustee, the right to have his bid reported to the Referee, and unless an advanced bid was made, or the Referee was of the opinion that the land had not brought a fair price, to have the sale confirmed to him. It is well settled that the Trustee is, in the absence of any controlling reason to the contrary, such as fraud, conceded, or probably manifest inability to comply with the terms of sale, bound to accept all bids and report the same to the Court. 17 Am. & Eng. Enc. 978. It is equally clear that the trustee had no right to demand that Herd disclose to him the names of the persons for whom he was acting. Conceding, however, *pro hoc vice* that he was entitled to do so, it was manifest that, when Herd, upon being told that his bid in a representative capacity could not be accepted, announced that he would thereafter bid for himself and upon his own responsibility was entitled to have his bid accepted.”

Quoting further the Court says,

“The effect of this order of the Referee was that Williams and Schmulbach were entitled to take the property at \$75,500.00 unless Herd would pay \$78,000.00, although he stood ready, willing and able to comply with his bid of \$75,525.00. This was manifestly unjust and therefore erroneous.”  
 . . . “To the suggestion that by affirming the order of the judge, the estate will be subject to danger of losing the interest on the amount of the bid, the answer is manifest—this result is due to the improper course pursued by the Trustee in refusing to accept and report Herd’s bid, the last and highest made.”

This cited case is almost an exact parallel with the case now before this Court, Baruch bid \$2250.00 (R 21). Prentice bid \$2325.00 (R 14-15), a raise of \$75.00 on a \$2250.00 bid. The Trustee, informed by the Referee that he, the Referee, was rejecting the \$2300.00 and \$2325.00 bids, when asked for his opinion, concurred in such rejection (R 15-16). The Trustee and Referee agreed that an upset bid of \$2475.00 must be made to be considered (R 15-16) thereby depriving Prentice of the right to purchase the property on like terms with the Baruch Company but at the offered price of \$75.00 more than the Baruch offer, and depriving the creditors of \$75.00.

**It Was an Abuse of Discretion for the Referee To Demand  
an Upset Bid of \$2475.00 Payable Immediately**

The Referee is bound to accept the largest and highest sum bid.

WILLIAMS—COAL CITY HOUSE FURNISHINGS COMPANY v. HOGUE, Supra;  
KIMMEL v. CROCKER, Supra.

**The Referee and the Trustee Erred in Refusing To Accept  
All Bids Offered**

The Referee and the Trustee erred and it constituted an abuse of discretion to refuse to accept the highest bid and in requiring that one bidder (Baruch) post a 10% deposit and another bidder (Prentice) deposit a certified check for 100% of his bid.

WILLIAMS—COAL CITY HOUSE FURNISHINGS COMPANY v. HOGUE, Supra;  
WOLKE LEAD BATTERY CO., 294 Fed. 511;  
COULTER v. BLIEDEN, 104 Fed. (2nd) 29-34.

In Coulter v. Blieden the Court stated:

“In bankruptcy the chief purpose is the protection of the interests of creditors.”

The record here clearly indicates that the interests of the creditors “went by the Board” when the sale was confirmed to Baruch at \$75.00 less than the Prentice bid (R 14).

In re Wolke Lead Batteries Company, the Court after reviewing the question of whether an offer to bid \$13,000.00 on a property on which the highest bid previously received had been \$12,000.00 was advantageous enough to the creditors to warrant the expenses of holding a resale, states:

“The advance bid (of \$13,000.00) offered by Knight was sufficiently substantial in amount to insure against increased costs and present a reasonable possibility of securing for the creditors, the protection of whose interest is the chief purpose of bankruptcy proceeding, the real value of the bankrupt’s property.”

In the instant case there would have been no additional expense involved save that of drawing a new confirmation of sale in favor of Prentice in lieu of the confirmation of sale to Baruch which had been drawn and signed prior to the advertised time of the sale (R 54-55).

### **The District Court Erred in Considering Statements Contained in the Referee’s Certificate on Review**

The unsupported statement of Baruch re the expenditures of \$125.00 prior to confirmation of sale should not have been considered by the District Court.

F. R. C. P. Rule 43 (A);

C. C. P. 1867;

C. C. P. 1869.

Even had the statement so made been under oath and/or supported by receipts or other form of written evidence it still should have had no bearing on the decision of the Court.

### **The District Court Erred and It Was an Abuse of Discretion To Confirm the Order of the Referee**

The order of the Referee being in error it follows that the order of the District Court sustaining the Referee was likewise in error.

CURIN v. NOURSE, 66 Fed. (2nd) 137;  
 COULTER v. BLIEDEN, 104 Fed. (2nd) 29-34;  
 KIMMEL v. CROCKER, 72 Fed. 599;  
 WILLIAMS—COAL CITY HOUSE FURNISHINGS CO. v. HOGUE, 197 Fed. 1;  
 WOLKE LEAD BATTERY CO., 294 Fed. 511.

### **SUMMARY**

This Appellant feels that this record shows an arbitrary abuse of discretion both on the part of the Trustee, the Referee and the District Court. Appellant in all good faith journeyed to Santa Ana on the day appointed and in all good faith bid on the real property that had on two separate dates been advertised. The arbitrary action of the Trustee and Referee in refusing to consider this Appellant's bid unless it was in an amount arbitrarily fixed by the Referee was clearly error and the citations given herein will, it is

believed, convince this Court that the orders complained of should be reversed and an order issue to confirm the sale to the Appellant.

There is no question raised in the record of the ability of Prentice to pay for the property. Furthermore as proof of his good faith Prentice did on April 15, 1943, deposit with the District Court a certified check in the sum of \$233.00 made payable to L. Boteler, Trustee and Ben E. Tarver, Referee, as a deposit to guarantee to the Estate, the Trustee thereof, the Referee, and to the Court, that this Appellant will purchase this property if this Court grants Appellant's prayer and confirms the sale of the subject property to him (R 47-48).

Wherefore, it is respectfully submitted that in justice and equity this Court should reverse the order of the District Court and that an order should issue confirming the sale of the subject property to this Appellant.

Respectfully submitted,

B. H. PRENTICE,  
*In Pro Per.*



**AFFIDAVIT OF MAILING**

STATE OF CALIFORNIA,

County of Los Angeles,—SS.

INEZ PATTERSON, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's residence address is 2911 Gage Ave., Huntington Park, Calif. That on the 22nd day of September, A. D., 1943, affiant served the within Appellant's Opening Brief on the Counsel for Appellee in said action, by placing 3 true copies thereof in an envelope addressed to Craig & Weller—Thomas S. Tobin at the business address of said Counsel, as follows: Craig & Weller—Thomas S. Tobin—817 Board of Trade Building, 111 West 7th St., Los Angeles, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at South Gate, California. That there is delivery service by United States mail at the place so addressed, there is a regular communication by mail between the place of mailing and the place so addressed.

INEZ PATTERSON.

Subscribed and sworn to before me this  
22nd day of September, 1943.

(SEAL)        N. FISHER,  
Notary Public in and for said  
County and State.